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Supreme Court U.S.

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IN THE
Supreme Court of the United States

October Term, 1990

ROCHELLE KONITS,

Petitioner

VS.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court
of the State of New York, Appellate Division,
Second Judicial Department

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

**OPINIONS BELOW AND
STATEMENT OF JURISDICTION**

Petitioner has sufficiently set forth the opinions of the court below. The basis upon which certiorari jurisdiction is asserted is adequately stated.

Statement of the Case

Petitioner was tried on an indictment charging her with the crimes of conspiracy in the fifth degree (New York Penal Law §105.05), criminal possession of a controlled substance in the fifth degree (New York Penal Law §220.06), criminal possession of a hypodermic instrument (New York Penal Law §220.45), and with violating sections 3335 and 3381 of the New York Public Health Law. When respondent had concluded the presentation of its case, it became apparent that petitioner disagreed with defense counsel regarding the presentation of the defense case. The disagreement, as herein relevant, centered on whether or not petitioner should testify in her own defense. Petitioner wished to do so but defense counsel recommended against it. After it had been told of the disagreement, the trial court, outside the presence of the jury, addressed the question of whether or not petitioner should testify:

THE COURT: As I have indicated on prior occasions, you as the defendant have the right to testify. You as the defendant have the right under our law to make that decision as to whether or not to testify.

Your attorney has indicated that his very best professional judgment is that you should not testify --

PETITIONER: Many cases have been lost, sir, because the defendant didn't open their mouths.

THE COURT: Excuse me. I would urge you to give full consideration to Mr. Wolfe's advice.

Again I should point out to you, that depending of course, on what your testimony will be it might open

doors to other testimony concerning your prior conduct, other conduct that you have engaged in --

PETITIONER: Alleged.

THE COURT: -- and, further, the prosecutor would have the right to cross-examine you and make inquiry of you concerning various types of conduct certainly involved in this or these incidents between August 5th and 15th, 1984, as well as and in addition to other conduct that you might have involved yourself in and the jury, of course, will hear all of that.

You mentioned that there have been a lot of cases where defendants have been convicted because they never said anything themselves. I would also want to indicate to you that based on my experience there have also been many, many defendants who have been convicted after they have testified and after they have been cross-examined and jurors [sic] certainly have on many, many occasions convicted such defendants.

PETITIONER: Sir, I --

THE COURT: The determination --

PETITIONER: Yes, I do understand you.

THE COURT: The determination, as indicated earlier on this issue, is yours.

PETITIONER: Sir, I do understand.

THE COURT: However, I would finally, once again, in conclusion, urge you in the strongest terms possible to

listen to, consider and, indeed, follow your counsel's advice.

PETITIONER: Then I'll tell you, sir, I'm not following my counsel's advice. I just wanted for the record to be known that I consider the People's alleged drug addicts to be on parole, totally with personal motives. You know, prior testimony -- total personal motives. That's on the record.

The second thing is that any time I have issued anything to any drug addict, right, or alleged drug addict, it has always been for the purpose of preventing an extremely high blood pressure, preventing -- the Valium slows down the --

THE COURT: I'm really not interested in your testimony. That decision again is up to you. I just wanted to make you aware of what might or might not happen, the results or implications of your testifying.

I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not testify.

All right, since there are witnesses available at this time it would seem appropriate that we should proceed.

DEFENSE COUNSEL: Your Honor, let me inquire about the scope of your advice to the doctor.
Certainly --

THE COURT: Excuse me, I have attempted and I have been as careful as I could in not giving any advice to anyone here.

(T. 876-879). A short time later, when counsel advised the trial court that petitioner had indicated to him that she would not testify, the trial court was advised by petitioner that she was thinking the matter over but had not made a decision (T. 882). Following a recess and testimony from petitioner's character witnesses, defense counsel rested. Before going further, the trial court excused the jury for its luncheon break and, in its absence, inquired of petitioner whether or not she was going to testify. Petitioner responded unequivocally, "No, sir, I'm not going to testify" (T. 935).

Summary of Argument

Petitioner's sixth amendment rights were not violated when the trial court intervened in a dispute between petitioner and her attorney over whether or not she should testify in her own behalf. The decision over whether or not to testify in her own behalf is reserved to a defendant. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Usually, a defendant and her counsel concur in whether defendant should testify. Here, petitioner wished to testify and her counsel disagreed. In light of this serious conflict, the trial court properly intervened pursuant to its broad power to take affirmative action to protect the rights of a criminal defendant. *Glasser v. United States*, 315 U.S. 60, 71 (1942).

The trial court's intervention was a balanced attempt to assure that petitioner had the knowledge and facts necessary to make an intelligent decision whether or not to testify. At the same time, the trial court urged petitioner to consider the advice of her attorney. At all times the trial court made it clear that in the final analysis the decision whether or not to testify was petitioner's and petitioner's alone. By no means was she denied the right to be the final arbiter of her defense and she was not deprived of her sixth amendment rights.

Argument

The Petition for a Writ of Certiorari Should Be Denied

Petitioner contends that she was deprived of her sixth amendment right to counsel. Specifically, petitioner contends that "the trial court improperly became a partisan in support of a defense attorney who was in an ongoing dispute with the client respecting the client's decision to testify in her own defense at her trial." She is wrong. "A petition for a writ of certiorari will be granted *only* when there are special and important reasons therefor." Rules of the Supreme Court, Rule 10.1 (emphasis added). In her petition, petitioner has not demonstrated that there are special and important reasons for review of this case. This is not surprising because the principles of law applicable to the instant situation are well settled. Moreover, the significance of their application to the instant controversy does not extend beyond the interest of the immediate litigants. Thus, this Court should deny the petition for certiorari.

In any event, petitioner's claim fails on the merits. The sixth amendment right to counsel does not deprive a defendant of the right to be the final arbiter of her defense. *Farretta v. California*, 422 U.S. 806 (1975); *Carter v. Illinois*, 329 U.S. 173 (1946). Indeed, the decision over whether or not to testify in one's own behalf is reserved to the defendant, who has the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). Ordinarily, a defendant and her counsel concur in whether the defendant should testify. Here, this was not the case. After the completion of the state's case, the court became aware that petitioner wanted to testify in her own behalf and defense counsel did not want her to so testify. Given this serious conflict, which, unless properly resolved, posed a clear threat to the petitioner's fifth and/or sixth amendment rights,

the trial court properly intervened pursuant to its broad power to take affirmative action to protect the rights of a criminal defendant. *Glasser v. United States*, 315 U.S. 60, 71 (1942). The trial court's intervention was particularly appropriate because a defendant should not lightly decide to testify considering that the "choice to take the stand carries with it serious risks of impeachment and cross-examination, it may open the door to otherwise inadmissible evidence which is damaging to her case." *Brooks v. Tennessee*, 406 U.S. 605, 609 (1972).

The trial court's intervention was consistent with the foregoing applicable principles of law and the matter was properly resolved. The colloquy between the trial court and petitioner demonstrates that the trial court's remarks were a balanced and successful attempt to assure that petitioner had the knowledge and facts necessary to make an intelligent decision whether or not to testify. The trial court clearly stated that the decision as to whether or not she should testify was petitioner's and petitioner's alone (T. 876-877, 879).¹ At the same time, the trial court, recognizing the significance of petitioner's decision, urged petitioner to consider the advice of her attorney (T. 878-879). Following the trial court's remarks, the defense called several character witnesses. At one point during their testimony, petitioner advised the trial court that she was thinking over whether or not to testify (T. 882). At the conclusion of their testimony, defense counsel rested without calling petitioner. Seeking to make certain that the choice was petitioner's, the trial court excused the jury. The trial court then inquired directly of petitioner whether or not she was going

¹ Relevant portions of the trial transcript are included in the appendix to this brief.

to testify. Petitioner indicated that she was not going to testify.²

In sum, petitioner's contention lacks merit. By no stretch of the imagination was petitioner denied the right to be final arbiter of her defense and she suffered no deprivation of her sixth amendment right to counsel.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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² A hearing on petitioner's motion to suppress evidence was conducted prior to trial. Petitioner and defense counsel disagreed at that hearing over whether or not she should testify. Following similar intervention of the trial court, petitioner testified at the suppression hearing.

APPENDIX

Trial Transcript Excerpts
(pp. 876-879, 882, 935)

(T. 876)

THE COURT: I'm just not clear, Dr. Konits. Do you intent [sic] testifying in this case?

THE DEFENDANT: I do.

THE COURT: As I have indicated on prior occasions, you as the defendant have the right to

(T. 877)

testify. You as the defendant have the right under our law to make that decision as to whether or not to testify.

Your attorney has indicated that his very best professional judgment is that you should not testify --

THE DEFENDANT: Many cases have been lost, sir, because the defendant didn't open their mouths.

THE COURT: Excuse me. I would urge you to give full consideration to Mr. Wolfe's advice.

Again I should point out to you, that depending of course, on what your testify [sic] will be it might open doors to other testimony concerning your prior conduct, other conduct that you have engaged in --

THE DEFENDANT: Alleged.

THE COURT: -- and, further, the prosector would have the right to cross-examine you and make inquiry of you

concerning various types of conduct certainly involved in this or these incidents between August 5th and 15th, 1984, as well as and in addition to other conduct that you might have involved yourself in and the jury, of course, will hear all of that.

(T. 878).

You mentioned that there have been a lot of cases where defendants have been convicted because they never said anything themselves. I would also want to indicate to you that based on my experience there have also been many, many defendants who have been convicted after they have testified and after they have been cross-examined and jurors [sic] certainly have on many, many occasions convicted such defendants.

THE DEFENDANT: Sir, I --

THE COURT: The determination --

THE DEFENDANT: Yes, I do understand you.

THE COURT: The determination, as indicated earlier on this issue, is yours.

THE DEFENDANT: Sir, I do understand.

THE COURT: However, I would finally, once again, in conclusion, urge you in the strongest terms possible to listen to, consider and, indeed, follow your counsel's advice.

THE DEFENDANT: Then I'll tell you, sir, I'm not following my counsel's advice. I just wanted for the record to be known that I consider the People's alleged drug addicts to be on parole, totally with personal motives. You know, prior

(T. 879).

testimony -- total personal motives. That's on the record.

The second thing is that any time I have issued anything to any drug addict, right, or alleged drug addict, it has always been for the purpose of preventing an extremely high blood pressure, preventing -- the Valium slows down the --

THE COURT: I'm really not interested in your testimony. That decision again is up to you. I just wanted to make you aware of what might or might not happen, the results or implications of your testifying.

I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not testify.

All right, since there are witnesses available at this time it would seem appropriate that we should proceed.

(T. 882).

THE COURT: All right. Just so that the record is clear, obviously Mr. Wolfe has indicated, Dr. Konits, that you have reconsidered the matter and determined not to testify in the case; is that accurate?

THE DEFENDANT: Sir, I'm thinking it over.

(T. 935).

You are not to discuss it among yourselves nor with anyone else nor permit anyone to discuss it with you.

You are not visit the scene, area or premises which have been described here to you nor read any media accounts related directly or indirectly to this matter and if there is any violation of any of those admonitions please call them to my Clerk's attention as quickly as you can.

The jury will be excused. We will see you at two o'clock, if you would, please, and if you would follow my Court Officer.

(The jury thereupon exited the courtroom.)

(The following discussion was had not within the presence of the jury.)

THE COURT: All right. I take it then, Dr. Konits, that you are not going to testify?

THE DEFENDANT: No sir, I'm not going to testify.

THE COURT: All right. The People rest, Mr. DiPietro?

MR. DiPIETRO: Yes, sir.

THE COURT: All right. I'll take motions and be ready with your closing arguments then at two ***